No. 77-368

In the Supreme Court of the United States

OCTOBER TERM, 1977

KENNETH BERDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 555 F. 2d 1329.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1977. A petition for rehearing was denied on August 9, 1977. The petition for a writ of certiorari was filed on September 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the admission into evidence of petitioner's refusal to answer a single

question during a lengthy, noncustodial interview constituted reversible error.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 41 counts of knowingly making fraudulent Medicare claims, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of two years' imprisonment on each count and a fine of $45,000.

The evidence showed that petitioner, a physician, operated the Point East Medical Center from 1970 to 1976 (Tr. 125, 726). During that time the Center's laboratory work was performed by two outside companies, Chem Lab and LaHuis Labs, both of which used inexpensive automatic testing processes (Tr. 82-93). Petitioner submitted inflated Medicare claims to the Department of Health, Education, and Welfare, misrepresenting that the laboratory tests were done manually in the center (Tr. 40, 41, 51-54, 72-75).[1] Medicare and Chem Lab officials alerted the Center's manager, Isadore Rudnick, to the incorrect billings (Tr. 128, 143, 162). When Rudnick and two other Center employees confronted petitioner, he directed them to continue billing at the inflated and inapplicable rates (Tr. 127, 130, 325-328, 364). Moreover, petitioner billed Medicare for tests, injections, and examinations that, according to the testimony of fourteen patients and five Center employees, had never been performed (Tr. 177, 195, 212, 233, 248, 260, 263, 272, 275, 280, 284, 289, 294, 402, 412, 418, 423,

[1]The government also introduced documentary evidence of the fraudulent billings (Tr. 40, 41, 51, 82-93; Gov't Exhs. 2-1 to 2-64).

455, 485, 486, 495, 497, 513-515, 907-910, 918-920, 924-926). After the investigation into petitioner's fraudulent scheme had commenced, he asked a patient and two employees to lie about the Center's practices (Tr. 28, 126-128, 178-185, 473).

Petitioner took the stand at trial and attributed the fraudulent billings to his office personnel (Tr. 220, 224, 229, 233, 235, 281, 295, 296, 733, 736). He also contended that the examinations for which he billed Medicare had been performed (Tr. 744-747).

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the district court committed reversible error in allowing a government witness to testify that petitioner had refused to answer a single question during the course of a wide-ranging, noncustodial interview conducted at petitioner's office by an investigator of the Department of Health, Education, and Welfare as part of an ongoing Medicare investigation.[2] Contrary to petitioner's claim (Pet. 6-8),

[2]The pertinent part of the testimony of the Health, Education, and Welfare Investigator detailing the interview (Tr. 528-533; the challenged portion is in italics) is as follows (a more complete transcript of that testimony is set out at Pet. App. 6a-17a):

> Q. Did you ask him or have any discussion about how he billed for this lab work?
>
> A. Yes. I asked him how he handled the billing of Medicare for lab, the lab tests performed by these laboratories.
>
> He replied that he billed a single separate charge for each individual test done. I asked him why he did that and he replied that he understood the laboratory did each test manually.
>
> I asked him why "O" was shown on the Medicare form as the place of service, "O" for office, and he replied that that was, this was an oversight and I asked him how much the lab, how much

the introduction of this evidence did not contravene the principles enunciated in *Doyle* v. *Ohio*, 426 U.S. 610, and *United States* v. *Hale*, 422 U.S. 171. In those cases this

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the lab would charge him for doing a profile on one of the people who typically got a complete examination and he replied twelve to fifteen dollars.

I asked him what, how he related his single charge for each of the fifteen to twenty tests done to their single charge for the profile and he replied that it was not directly related and no further explanation.

Q. Did you discuss any Blue Shield Newsletters with him?

A. Yes. He, at this time he explained that he had quit billing for lab work in late 1974, early 1975, the way he had done it previously, because he believed he learned from a Newsletter sent out by Blue Shield that this was the improper way to bill for lab work.

I asked him if he specifically recalled receiving in early 1974 a Newsletter which explained the very fact of how doctors were not to bill for manual tests when they were having automated profiles of tests done in a laboratory somewhere and he denied recalling getting any such Newsletter in early 1975.

I then asked him how he billed, handled billing for lab work since that time, since early 1975 or late 1974 when he said he no longer billed for it. He replied that the blood would be, when the blood was sent to the lab to be done since that time he would send along with the blood a 1490 signed by the patient which the, and the laboratory would handle their own billings for the, for the laboratory tests that they had performed.

He told me that he began using a Laboratories of Florida as the lab where he primarily sent blood beginning in early 1975.

I asked the doctor if he owned any interest in Laboratories of Florida and he said no.

I asked him if he received any kind of payments from Laboratories of Florida or from Delmar Porter who owned the lab, and he replied no.

I asked him if he had received any offer of any kind of payment be they drawing fees, kickbacks, rebates or whatever

Court held that a defendant's post-arrest silence, after having received *Miranda* warnings, could not be introduced to impeach his exculpatory testimony at trial. The rationale for those decisions was that

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from Mr. Porter of Laboratories of Florida or any other laboratory and he replied no.

Then he, after hesitating, he said possibly he had received a, he had a discussion with a representative of some lab at some point in time. I asked him would he tell me who this person was or the lab was and he replied no, that he did not want to discuss that further.

Q. Did you discuss procedures followed when complete physicals were provided his patients?

A. Yes. I asked what was typically done, would be done on a patient who came in for a complete physical or workup and the doctor replied in addition to his examination of the person, listening to the heart, lungs and everything, that he had certain other tests and procedures run.

I believe I recall he mentioned specifically a cardiogram, chest x-rays, Pap tests for ladies, prostate checks for men, stool tests and sigmoidoscopies as all being routinely done on a complete physical.

Q. Did you discuss how he did a sigmoidoscopy or his procedure in performing that with him, sir?

A. Yes. I was aware of this form from the investigation, so I asked the doctor if, when this was done, if he discussed beforehand with the patient what was going to be done and how he would go about doing it.

He replied that, yes, that particularly with elderly people he usually discussed the matter beforehand with them, because the elderly patients have many problems, rectal problems, hemorrhoids and other conditions which might cause problems which, he consequently did, caused him to discuss this with the patients before the matter was, procedure was performed.

Q. Did you discuss any mistakes involved in sigmoidoscopies?

A. I asked if he would bill for a sigmoidoscopy when only a prostate check was given and he replied no, that that was not,

> [s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.

Doyle v. *Ohio, supra*, 426 U.S. at 617.

The instant case is distinguishable. Petitioner was neither under arrest nor subjected to custodial interrogation at the time of his refusal to answer (see *Beckwith* v. *United States*, 425 U.S. 341), and his conduct was not analogous to a defendant's failure to respond to questions after arrest. Petitioner does not claim that he failed to understand his *Miranda* rights, and his statement that he did not wish to discuss the subject of "kickbacks" was a direct answer freely given, not an ambiguous assertion of the right to remain silent. Accordingly, the introduction of this statement into evidence was not inconsistent with either *Hale* or *Doyle, supra*. See *United States* v. *Joyner*, 539 F. 2d 1162 (C.A. 8), certiorari denied, 429 U.S. 983.

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would not be done, that he would bill for sigmoidoscopies when it was done.

Q. Sir, did you discuss any specific patients with him at that time?

A. Yes. I then told the doctor that I would like to discuss certain, some specific cases with him where we had discovered possible irregularities and that it would help if he would make his records available to us on those patients.

He said yes, he would, and I gave him, and initially I gave him a list, I believe, of seven or eight people and he went to pull his medical records on those patients so that we could have it in discussing the patients.

Q. Do you remember what was said about the patients?

A. If I might refresh my memory from the notes I made on those specific patients that I, I discussed, I believe there was eight patients with the doctor. * * *

Even assuming that the testimony to which petitioner now objects (he did not object at trial (Tr. 531)) may have amounted to an improper reference to an exercise by him of his Fifth Amendment privilege (but cf. *United States* v. *Goldman*, C.A. 1, No. 77-1227, decided October 14, 1977), its introduction into evidence, even if error, was clearly harmless in light of the overwhelming evidence of petitioner's guilt (see pages 2-3, *supra*). On that basis the decision below can be reconciled with *United States* v. *Ghiz*, 491 F. 2d 599 (C.A. 4), and *Booton* v. *Hanauer*, 541 F. 2d 296 (C.A. 1), cited by petitioner (Pet. 8-10), for both those decisions recognize that error of the sort of which petitioner complains can be harmless (Pet. App. 19a, 24a-25a).[3]

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[3]Petitioner answered the agent's question whether he had ever received kickbacks, and then said that he might have had a discussion regarding kickbacks with a representative of a testing laboratory (note 2, *supra*). His only objection, therefore, can be to the agent's statement that petitioner refused to name the representative or the laboratory and to discuss the matter further. It is unlikely in the extreme, given petitioner's initial discussion of kickbacks with the agent, that the one arguably objectionable statement by the agent, given in the context of pages of testimony and not directly related to the crime charged, could have prejudiced petitioner. Petitioner's failure to object to the statement at the time it was made supports this view.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

DOJ-1977-11